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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. ~~723~~ 40

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as successor by merger to INTERNATIONAL FUR & LEATHER WORKERS UNION OF UNITED STATES AND CANADA,

Petitioner-Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD and LANNOM MANUFACTURING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner-Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD and LANNOM MANUFACTURING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO,[1] a labor organization, prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Sixth Circuit, Judge Stewart dissenting, (R. 65, Appendix A herein) which, without reaching the merits, dismissed the petition of the National Labor Relations Board (R. 84-85) for enforcement of its unfair labor practice order (R. 76-83)

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[1] Amalgamated is successor by merger to International Fur & Leather Workers Union of United States & Canada (hereafter interchangeably referred to as Fur and Leather or the Union). The merger was effectuated in February, 1955 after the submission of the case below (R. 65).

against the respondent Lannom Manufacturing Company. The ground of dismissal was that Fur and Leather, the charging union, had lost its compliance status under the Labor Management Relations Act, 1947, because its former president, Ben Gold, had been convicted under 18 U. S. C. § 1001 of having filed a false non-Communist affidavit (R. 66-74).

Opinions Below

The opinions in the Court of Appeals (R. 66-74, Appendix B herein) are reported at 226 F. 2nd 194.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The order sought to be reviewed was filed October 6, 1955 and the time for filing this petition was extended to and including March 3, 1956 by an order made by Mr. Justice Reed on December 19, 1955.

Questions Presented

1. Whether a labor organization may be retroactively deprived of its compliance status under section 9(h) of the Labor Management Relations Act, 1947, on account of a conviction, in 1954, of one of its officers of having filed a false affidavit under that section in 1950.

2. If so, whether the loss of compliance may be carried into 1952, when the 1950 affidavit (being effective to maintain compliance for only one year) was *functus officio* as to the Union's compliance status, and such status was then based upon a later affidavit which was not the subject of indictment or conviction.

3. Whether, even if the answers to both of the foregoing questions are affirmative, such decompliance may be

effectuated while the conviction on the 1950 affidavit is still on appeal and the appeal presents substantial questions.

4. Whether the Court of Appeals for the Sixth Circuit was not required to give effect to a final judgment of the District Court for the District of Columbia, entered in an action between the Union and the Board and affirmed by the Court of Appeals for that Circuit, that the Union's compliance status was not affected by the conviction.

Statute Involved

29 U. S. C. §159(h) [Labor Management Relations Act, 1947, § 9(h)] provides:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits."

Statement of the Case

1. The Union's Compliance

Prior to its merger with Amalgamated, Fur and Leather was an international union to which were affiliated many local unions throughout the United States. For many years, until his resignation in 1954, Ben Gold had been its president (R. 25).

Since 1950 Fur and Leather had required its officers, as a condition of holding union office, to file annually, in accordance with the compliance provisions of the Act, the non-Communist affidavits provided by section 9(h) thereof. Such affidavits are effective to maintain "compliance" for one year. Annually in 1950, 1951, 1952, 1953 and 1954 these affidavits were filed by each of its officers, including Gold, and the Union's compliance was continuous (R. 24).

2. The Unfair Labor Practices

Early in 1951, Lannom discharged a number of its employees who were then attempting to organize and join a local affiliated to Fur and Leather. On charges duly filed, the Board, on February 27, 1952, issued an unfair labor practice complaint against Lannom. After holding hearings the Board, on March 20, 1953, issued a Decision and Order (R. 76-83) in which it found that Lannom had interfered with, restrained and coerced its employees in the exercise of their guaranteed right to self-organization and, among other remedial action, ordered the reinstatement with back pay of twenty-four employees who, it found, had been unlawfully discharged.

3. Gold's Subsequent Indictment and Conviction

In August, 1953, Gold was indicted on a charge that his 1950 affidavit was false. The indictment did not put in issue the truthfulness of the 1951, 1952 or 1953 affidavits which he had filed before the indictment and on which Fur and Leather's subsequent compliance status (and particu-

larly its status on February 27, 1952, the date when the Board issued its complaint) was based.

Gold was convicted on April 30, 1954 and sentenced to one to three years (R. 57-58). The trial court continued Gold on the same bail pending appeal, ruling that the case presented substantial issues of law and fact warranting review (R. 40). An appeal to the Court of Appeals for the District of Columbia was immediately taken and the case is now pending undetermined in that court (No. 12352).[2]

4. The Litigation in the District of Columbia Concerning the Effect of the Indictment and Conviction Upon the Union's Compliance Status.

As a result of the conviction, the indictment, and other preceding events involving accusations that Gold's affidavit was false, the Board, on three separate occasions, sought to declare Fur and Leather out of compliance. In a series of actions between the Union and the Board, the District Court and the Court of Appeals for the District of Columbia, on each such occasion, enjoined the Board from impairing the Union's compliance status on the ground of the falsity of the affidavits, holding that the sanction against a false affidavit was a criminal one, against the offending officer, not decompliance of the Union. In *Fur and Leather Union* v. *Herzog*, 110 F. Supp. 220, affd. *sub nom. Farmers* v. *Fur and Leather Union*, 211 F. 2d 36, cert. den. 347 U. S. 943, the Board was permanently enjoined (R. 42-43) from conducting an inquiry into the truth or falsity of the Gold affidavits. The Court of Appeals there held (211 F. 2d at p. 39):

> "The scheme of § 9(h) is clear. It imposes a criminal penalty for filing a false affidavit under

[2] Oral argument on the Gold appeal was had before a panel of the Court on March 28, 1955. On January 12, 1956, the Court, *sua sponte*, set the case down for rehearing *in banc* and such rehearing was had on February 9, 1956.

> § 9(h), in order to deter Communist officers from filing at all; then the failure of such an officer to file is made the touchstone for barring his union from crucial benefits under the Act, as an incentive to the membership to rid itself of such leadership. There is nothing in the Act or in its legislative history or in good sense to indicate that Congress meant to go further and impose the drastic penalty of excluding the union from the Act's benefits because its officers had deceived the Union as well as itself by filing a false affidavit."

Subsequently, in *Fur and Leather Union* v. *Farmer,* 117 F. Supp. 35 (D. C., D. Col.), stay den. Dec. 4, 1953 (No. 12347, C. A., D. Col.); cert. den. 347 U. S. 943, the Board was enjoined from impairing or suspending the Union's compliance as a result of Gold's indictment (R. 46-48). And in *Fur and Leather Union* v. *Farmer,* 26 Labor Cases ¶ 68,596 (not officially reported), Civil No. 2656-54, July 20, 1954 (D. C., D. Col.), affd. 221 F. 2d 862 (C. A., D. Col.), the same court further enjoined the Board from impairing the Union's compliance status on account of Gold's conviction. The Court of Appeals for the District of Columbia wrote on this occasion as follows:

> "Congress explicitly provided a criminal penalty for false non-Communist affidavits. It assumed that this threat of criminal sanctions would be a sufficient deterrent to false swearing by union officers. If these sanctions have been proved insufficient, it is for Congress, not the Board, to find new ones."

The Court added in a footnote:

> "Nor does the Act empower the Board to reject Gold's 1954 affidavit on the ground that his 1950 affidavit was false."

The injunction which was thereupon affirmed and the findings and conclusions on which it was based (R. 51-54), were in effect during the pendency of the enforcement proceedings in the Sixth Circuit, as that court recognized (R. 68-69, 226 F. 2d, at p. 196). Nevertheless the court below refused to give them effect.

5. The Proceedings and the Ruling Below

In obedience to the injunction (R. 21) the Board filed the present enforcement petition. Lannom thereupon moved to dismiss because of the conviction, alleging that Gold's "continuous" affiliation with the Communist Party was "well known to all the members of the Labor Board, as well as to the general membership of the charging union" (R. 1). The Union was granted intervention for the purpose of opposing the motion to dismiss (R. 2-12).

The order sought to be reviewed sustained this motion, the majority holding that

1. They would not follow the several rulings on the question by the Court of Appeals for the District of Columbia. 226 F. 2nd, at p. 196.

2. A false affidavit is a nullity for compliance purposes. *ibid,* at p. 197.

3. Gold was a member as of February 27, 1952 (the critical date, when the Board's complaint issued) because his August 1950 affidavit was false. *ibid,* at p. 198.

4. The pendency of Gold's appeal is immaterial. *ibid,* at 199. The court said on this:

> "This case is complicated by the fact that an appeal on the part of Gold is pending in the Court of Appeals for the District of Columbia from the judgment of the District Court. It is indefinite when that litigation will end, considering the possibility of further proceedings in the Supreme Court in the event of affirmance, and the possibility of a

> new trial in the event of a reversal. We realize that the ultimate termination of the criminal proceedings in the District of Columbia may present a different factual situation from what is now before us, but consider it inadvisable to 'freeze' this proceeding for an unreasonable length of time awaiting such termination, which would in the meantime prevent a possible review by the Supreme Court if so desired by one of the parties. We are accordingly ruling on the motion on the basis of the record as it presently stands."

Judge Stewart dissented on the ground that the Union's compliance status in February, 1952 was not based on Gold's 1950 affidavit but on his affidavit filed in August, 1951, which was not shown to be false. *ibid,* at 199-200.

Reasons For Granting The Writ

1. (a) The decision of the Sixth Circuit, as the majority expressly states, is directly in conflict with a consistent series of decisions of the Court of Appeals for the District of Columbia rendered before and adhered to since the holding below. *Farmer* v. *U. E.*, 211 F. 2d 36, cert. den. 347 U. S. 943; *Farmer* v. *IFLWU,* stay den., No. 12,347 (C. A., D. Col.), September 9, 1954; cert. den. 347 U. S. 943; *Farmer* v. *IFLWU,* 221 F. 2d 862; *International Union of Mine, Mill & Smelter Workers* v. *Farmer,* 226 F. 2d 780. See also *Aerovox Corp.* v. *NLRB,* 211 F. 2d 640; cert. den. 347 U. S. 968.

Since the Board is located within the District of Columbia and since all international and national unions which seek to comply must file their compliance forms and registration statements within the District, the conflict flowing from a decision which results in a union being in compliance in one circuit but decomplied in another

solely because of a disagreement between the courts of appeal should be settled by this Court.

(b) The decision appears to be in conflict also with earlier holdings in the same circuit (*NLRB* v. *Sharples Chemical Co.*, 209 F. 2d 645; *NLRB* v. *Wiltse*, 188 F. 2d 917, cert. den. 342 U. S. 859) and in the Fifth Circuit (*NLRB* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369) which rejected as disruptive and unworkable the notion that the truth or falsity of affidavits predicating a union's compliance status could be attacked collaterally at the instance of an employer in an unfair labor practice proceeding.

2. The question presented is important to the administration of the Labor Management Relations Act, 1947. Indeed, the majority below gave as one of its reasons for refusing to await the outcome of the Gold appeal, the desirability of obtaining an early settlement of the question by this Court. "We * * * consider it inadvisable to 'freeze' this proceeding for an unreasonable length of time * * * which would in the meantime prevent a possible review by the Supreme Court if so desired by one of the parties." (226 F. 2d, at p. 199.)

3. The decision below is unjustified by the legislative history of § 9(h), erroneously construes the statute, violates fundamental legal principles, threatens the stability of labor agreements and relationships, and imposes serious injury upon innocent persons and organizations, in summary, as follows:

(a) The legislative history shows that Congress intended that the sole sanction for filing a false non-Communist affidavit should be punishment for the offending affiant. It rejected union decompliance as neither a practical nor a suitable sanction. 2 *Legislative History, Labor Management Relations Act*, 1947, pp. 1547, 1625, Congressional Record, Senate, June 5, 1947, p. 6604, June

12, 1947, p. 7002; Cf. H. R. 3020, 80th Cong. 1st Sess., 1 *Legislative History*, p. 190. See also *Matter of American Seating Co.*, 85 NLRB 269; *Matter of Alpert and Alpert*, 92 NLRB 806; *Matter of Craddock-Terry Shoe Corp.*, 76 NLRB 842; *Matter of Sunbeam Corporation*, 89 NLRB 469 and 93 NLRB 1205. Cf. *NLRB* v. *Sharples Chemical Co.*, 209 F. 2d 645 (6th Cir.) and cases there cited.

(b) Even if union decompliance were a permissible sanction, current decompliance could not be imposed because of a false affidavit filed more than a year earlier. Such an affidavit is *functus officio* as far as a union's current compliance status is concerned. Cf. *NLRB* v. *Dant & Russell, Ltd.*, 344 U. S. 375.

(c) The § 9(h) affidavit is, as a matter of constitutional necessity, in the present tense; otherwise the statute would be *ex post facto* and a bill of attainder. *American Communications Association* v. *Douds*, 339 U. S. 382, at pp. 413-4. Gold's conviction on the 1950 affidavit, upon an indictment which did not question the validity of his 1951, 1952 or 1953 affidavits, cannot establish the falsity of the later affidavits.

(d) The opinion below is based upon a hostage theory of justice. Twenty-four workers in Tennessee sought to join a union of which the officers had sworn, under penalty of severe criminal sanctions, that they were not members of or affiliated to the Communist Party and which had a certificate of compliance from the Board. The ruling below penalizes them because an indictment charging falsity of an affidavit made by an officer in New York was returned more than two years later and was followed by a conviction. Since the guilt in making a false affidavit is the affiant's, it is constitutionally impermissible to penalize the victims of Lannom's unfair labor practices because of their association with the affiant in the same union. As the Court of Appeals for the District of Columbia has observed in *Farmer* v. *Fur and Leather Union*, 211 F. 2d 36:

> "To impose this penalty [of decompliance] upon the great mass of union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets."

(e) The court below erred in holding the 1950 affidavit false although the judgment of conviction is *sub judice* in an appeal involving substantial questions (Cf. *United States* v. *Valenti*, 207 F. 2d 242 [3rd Cir.] reversing 106 F. Supp. 121). It emphasized this error by extending the assumption of falsity of the 1950 affidavit into 1952. Cf. *American Communications Association* v. *Douds, supra.*

(f) The retroactive decompliance of a union because of the later-discovered falsity of an affidavit of one of its officers is potentially disastrous to the stability of labor relations. Contracts covering tens of thousands of workers were entered into by Fur and Leather and by its affiliated and constituent bodies on the basis of its then current compliance status. In larger unions contracts covering hundreds of thousands of workers would be involved. If a union's compliance is to be taken away retroactively years later because of the discovered misconduct of one of its officers, all of its contracts, if they provide for union security, have, retroactively, become unlawful. The disruptive effect of such a construction is apparent.

4. The decision below denies full faith and credit to a decision of a court of competent jurisdiction rendered in an action between the parties involved concerning a status established and maintained and, in a sense, having its domicile within the District of Columbia, which the courts of that district, in holdings twice denied review by this Court, have held is not impaired by the falsity, real or alleged, of the affidavits.

Unless the doctrine of *res judicata* is applied, any proceeding before the Board is subject to endless delays while an employer raises issues not only concerning the

falsity of the non-Communist affidavits required by section 9(h), but of the financial and other data required by section 9(f) and (g). Cf. *NLRB* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369 (5th Cir.); *NLRB* v. *Wiltse*, 188 F. 2d 917 (6th Cir.). If Lannom is free to litigate whether Gold's affidavits were false, every other employer is also free to do so, for there is no reason why another employer should be bound by Lannom's success or failure in this respect. Unfair labor proceedings would therefore be devoted to litigating and relitigating, not whether an unfair labor practice has been committed, but whether the compliance affidavits, reports and records, past or present, are true or false; and no employer except the particular employer would ever be bound by the outcome. Cf. *NLRB* v. *Coca Cola Bottling Co.*, — U. S. —, Oct. Term, 1955, No. 79, decided February 27, 1956.

CONCLUSION

The writ of certiorari should be issued and the order below reversed.

March 1, 1956.

Respectfully submitted,

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APPENDIX A

Order Appealed From

Order Sustaining Motion to Dismiss

(Filed October 6, 1955)

On Petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the motion of respondent to dismiss the petition for enforcement, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the said motion be and is hereby sustained.

APPENDIX B

Opinions in Court of Appeals

No. 12328

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ON PETITION for Enforcement of an Order of the National Labor Relations Board.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LANNOM MANUFACTURING COMPANY,

Respondent.

Decided October 6, 1955.

Before SIMONS, Chief Judge; MILLER and STEWART, Circuit Judges.

MILLER, Circuit Judge. The National Labor Relations Board has filed a petition seeking enforcement of its unfair labor practice order heretofore issued against the respondent, Lannom Manufacturing Company. The respondent employer has moved to dismiss the petition. The case is before us on the motion only, not on the merits.

In support of its motion, the respondent alleges that the charging union, International Fur and Leather Workers' Union, at the time the Board issued the complaint and

continuously thereafter, was not in compliance with Sec. 159(h), Title 29, U. S. Code, which requires the filing of non-Communist affidavits, because Ben Gold, its president, was at all times material affiliated with the Communist Party, that his affidavit to the contrary was false, and that he had been convicted of perjury for having filed such false affidavit with the Board.

The Board was advised after filing its petition for enforcement that respondent intended to challenge the compliance status of the charging union, and in order to have the pertinent facts before the Court, filed a supplemental petition for enforcement, to which the motion to dismiss was subsequently directed, setting out the following facts, about which there is no dispute.

The original charge instituting the proceeding in this case was filed by the International Fur and Leather Workers' Union on April 18, 1951. The complaint issued February 27, 1952.

Beginning in August 1950 and annually thereafter the Union filed non-Communist affidavits executed by its officers pursuant to Section 9(h) of the Act, Sec. 159(h), Title 29, U. S. Code. These included annual affidavits of Ben Gold, president of the Union. The first Gold affidavit, dated August 29, 1950, was filed on or about August 30, 1950. In reliance on these affidavits the Board deemed the Union to be in compliance with Section 9(h) for the period following August 30, 1950, and including February 27, 1952, the date of the complaint.

On or about August 28, 1953, an indictment under Sec. 1001, Title 18, U. S. Code was returned against Gold in the District Court for the District of Columbia charging that the non-Communist affidavit which he had filed with the Board on August 30, 1950 was false. On April 30, 1954, this criminal proceeding culminated in his conviction. An appeal is now pending in the Court of Appeals.

Appendix B

Considerable litigation in the District of Columbia has arisen out of the foregoing situation, briefly summarized as follows:

On December 19, 1952, the Board called on Gold and certain officers of other unions for a reaffirmation of their affidavits previously filed in 1949 through 1952. This was prompted by a presentment handed up by a grand jury in the U. S. District Court for the Southern District of New York, which reported that a number of officers of unions had appeared before the grand jury, and while identifying the affidavits filed by them with the Board, had pleaded their constitutional privilege with respect to the truth or falsity of such affidavits. The unions brought suit in the District Court to enjoin the Board from conducting such an inquiry on the ground that it was beyond the Board's authority under the Act. The District Court upheld this contention and on January 27, 1953 issued the injunction. *United Electrical Workers, et al.* v. *Herzog, et al.*, 110 F. Supp. 220. The Court of Appeals affirmed. *Farmer, et al.* v. *United Electrical Workers, et al.*, 211 F. (2d) 36, cert. denied, 347 U. S. 943.

Following the return of the indictment on August 28, 1953, the Board on October 23, 1953 promulgated a Statement of Policy with respect to representation proceedings involving unions which had officers under indictment for false non-Communist affidavits. The Statement of Policy provided for the withholding of certification of the union as bargaining representative pending the outcome of the indictment. Pursuant to the Statement of Policy the Board refused to process representation petitions of the International Fur and Leather Workers Union. The Union sought an injunction against the enforcement of the Statement of Policy and the District Court on November 19, 1953 issued a preliminary injunction to that effect. *International Fur & Leather Workers Union* v. *Farmer*, 117 F. Supp. 35. A

stay pending appeal was denied by the Court of Appeals on December 4, 1953, which also on July 2, 1954 dismissed the appeal as moot because of the intervening conviction of Gold and the filing of another action, referred to below, based on the conviction of Gold instead of the indictment.

Following Gold's conviction on April 30, 1954, after which he was reelected as President of the Union, and following a show-cause order, the Board on May 28, 1954 issued a Determination and Order declaring its compliance letter to the Union on June 11, 1953 to be of no force and effect, that the Union was not in compliance, and that Gold's affidavit of May 11, 1954 submitted for a further twelve months compliance period be rejected "in the interests of protecting the integrity of the Board's processes and of effectuating the policies and purposes of Section 9(h) of the Act." The Union thereupon sought and on July 23, 1954 obtained from the District Court a preliminary injunction enjoining the Board from "Revoking, suspending or restricting the compliance status" of the Union and "Taking or refusing to take any action" by reason of Gold's conviction for having filed the false affidavit. Case unreported. On September 9, 1954 the Court of Appeals denied a stay pending appeal, and on February 15, 1955 affirmed the judgment of the District Court. *Farmer* v. *International Fur & Leather Workers Union,* 221 F. (2d) 862.

In the foregoing litigation the Court of Appeals for the District of Columbia has taken the position that the function of the Board with respect to the affidavits required by the Act are administrative only, with no authority to inquire as to the truth or falsity of the affidavits; that the Board has no authority under the Act to deprive the Union of its compliance status under Sec. 9(h) if the affidavits have been filed; that the Act imposes a criminal

penalty for filing a false affidavit which in the opinion of Congress was a sufficient deterrent to false swearing by union officers; and that there is nothing in the Act or in its legislative history to indicate that Congress meant to go further and impose the drastic penalty of excluding a union from the Act's benefits because one of its officers filed a false affidavit, even though the membership of the union was aware of its falsity. See also; *Aerovox Corp.* v. *N. L. R. B.*, 211 F. (2d) 640, C. A. D. C.

As indicated by the foregoing recital of the actions of the Board, the Board does not agree with this construction of the Act. However, in view of the injunction issued against it it felt compelled to file the present enforcement proceeding. It has filed a Memorandum giving the Court the benefit of its view that this Court is empowered in this proceeding to decide that Gold's conviction invalidates the validity of the complaint. The International Fur and Leather Workers Union was granted leave to intervene and has filed a brief in opposition to the motion to dismiss.

We have heretofore indicated disagreement with the construction given to the Act by the foregoing cases. *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. (2d) 645, 650, C. A. 6th; *N. L. R. B.* v. *Wiltse*, 188 F. (2d) 917, C. A. 6th. We held in those cases that a factual issue of compliance could not be raised and litigated by a respondent in an unfair labor practice proceeding, but expressed the view that authority to determine compliance or non-compliance on the part of the charging union existed in the Board and that such determination could be made by it through separate administrative proceedings. Reference was made in the *Sharples* case to the elaborate administrative structure established and used by the Board following the enactment of the Labor Management Relations Act of 1947 for the purpose of determining prior to the issuance of a complaint that the charging union was in

compliance; see also: *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. (2d) 840, Note 1, p. 844, C. A. 4th; *Law* v. *N. L. R. B.*, 192 F. (2d) 236, 238, C. A. 10th; and to the recognition and apparent approval by the Supreme Court of such administrative proceedings. *N. L. R. B.* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, at p. 325. The views expressed in *N. L. R. B.* v. *Sharples, supra,* have since received approval in *American Rubber Products Corp.* v. *N. L. R. B.*, 214 F. (2d) 47, 55, C. A. 7th, and *N. L. R. B.* v. *Vulcan Furniture Mfg. Corp.*, 214 F. (2d) 369, 371, C. A. 5th, cert. denied, 348 U. S. 873. For the reasons stated in *N. L. R. B.* v. *Sharples Chemicals, Inc., supra, and N. L. R. B.* v. *Vulcan Furniture Mfg. Corp., supra,* we adhere to the view heretofore expressed by us.

Where compliance involves a question of law arising out of established or undisputed facts, it appears settled that the Court in an enforcement proceeding has the authority to determine if the charging union is in compliance. *N. L. R. B.* v. *Highland Park Mfg. Co., supra,* 341 U. S. at p. 325-326. In that case the Supreme Court held that the Court of Appeals was right in overruling the Board and determining upon undisputed facts that the Board could not entertain the complaint, saying: "We think . . . that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

In *N. L. R. B.* v. *Dant,* 344 U. S. 375, the legal effect of affidavits filed by union officers was successfully challenged in an enforcement proceeding in the Court of Appeals. Although the Supreme Court reversed the case on its merits, no question was raised about the authority of the Court to determine non-compliance where a factual question was not involved. Prior to these rulings by the

Supreme Court, the Court of Appeals for the Fifth Circuit had indicated, without deciding, that if it was made to appear to it by clear and positive proof that the Board has taken jurisdiction of a charge by a union which has not complied with Sec. 9(h) of the Act, it would not enforce the Board's order. *N. L. R. B.* v. *Red Rock Co.*, 187 F. (2d) 76, 78, C. A. 5th, cert. denied, 341 U. S. 950.

In the present case, as the record now stands, there is no factual issue about the falsity of Gold's 1950 affidavit. A jury has so found. We see no reason why this Court can not, as a matter of law, give to that conviction the proper legal effect which should follow from it. As stated in *N. L. R. B.* v. *Vulcan Furniture Mfg. Corp., supra,* what purports to be an affidavit is now merely a piece of paper evidencing false swearing. Certainly this Court is not required to blindly accept the form and ignore the realities. Irrespective of a possible lack of statutory authority in the Board, which is an administrative agency created by a statute and deriving its authority from that statute, to investigate the truth or falsity of affidavits filed with it, it would seem to be a fundamental principle that a court whose jurisdiction is invoked by a petitioner can consider the legal effect of undisputed facts placed before it in the record in determining whether the petitioner is entitled to the relief sought. There is no doubt but that the legal effect of non-compliance with Sec. 9(h) of the Act is a bar to enforcement proceedings in the Courts. *N. L. R. B.* v. *Highland Park Mfg. Co., supra; N. L. R. B.* v. *Dant,* 344 U. S. 375; *N. L. R. B.* v. *Sharples Chemicals, Inc., supra,* 209 F. (2d) at p. 650, C. A. 6th. "It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct." *N. L. R. B.* v. *Highland Park Mfg. Co., supra,*

341 U. S. at p. 325. Such authority in the court effectuates rather than obstructs the plain congressional purpose to "wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our government." *N. L. R. B.* v. *Highland Park Mfg. Co., supra,* 341 U. S. at p. 325. Nor does it conflict with the congressional purpose, referred to by us in *N. L. R. B.* v. *Wiltsie, supra* and *N. L. R. B.* v. *Sharples Chemicals, Inc., supra,* of confining the evidence in unfair labor practice proceedings to the merits of the case in order to avoid delays resulting from the trial of collateral issues and to enable the Board to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives. No trial of such a collateral issue is here involved. In our opinion, as a matter of law, the 1950 affidavit of Gold and his subsequent conviction affirmatively show on the present record in this case a lack of compliance on the part of the charging union on August 30, 1950 and for such time thereafter as such conditions continued to exist.

The Union contends that since the present complaint was issued on February 27, 1952, compliance is not based on the August 30, 1950 affidavit, but on the affidavit of Gold filed a year later, approximately in August, 1951, and that there is no showing that the August 1951 affidavit is false. We find little merit in this contention, technical at its best. Compliance or non-compliance is based on whether Gold was a member of the Communist Party on February 27, 1952. It is an established fact that he was a member of the Communist Party on August 30, 1950. The nature and fundamental characteristics of the Communist Party have received considerable judicial consideration. In his separate opinion in *American Communications Association* v. *Douds,* 339 U. S. 382, Justice Jackson pointed

out (p. 432) the differences between the Communist Party and the major political parties in the United States, that membership in it is totally different from membership in the usual political party, and that *inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party.* He wrote: "The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the Party who hold the code. Moreover, each pledges unconditional obedience to party authority. . . . For any deviation from the party line they are purged and excluded." See also similar expressions of views by Chief Justice Vinson, Justice Frankfurter and Justice Jackson in *Dennis* v. *United States,* 341 U. S. 494, at pages 498, 547 and 564 respectively. Chief Judge Simons of this Court has previously had occasion to call attention to these same characteristics. *Albertson* v. *Millard,* 106 F. Supp. 635, 643, E. D. Mich. In the absence of a showing to the contrary, the reasonable presumption would be a continuing membership in such an organization rather than a withdrawal from the membership ranks. Considering the falsity of the 1950 affidavit and the nature of the Communist Party, we do not regard the renewal affidavit in 1951, unsupported by any alleged change in the factual situation, as a sufficient showing to the contrary. In *Hupman* v. *United States,* 219 F. (2d) 243, 248, C. A. 6th, we recognized the probability and possibility of a change of allegiance or affiliation on the part of a member of the Party, particularly if the proof of status is confined to a time remote from the date of the offense charged, but rejected the contention that membership in the Communist Party on a certain day could be

proved only by evidence of what happened or transpired on that particular day.

It also appears that the Board, by its Determination and Order of May 28, 1954 found that the Union was not at that time in compliance with Sec. 9(h) of the Act. Although the District Court enjoined the Board from revoking the compliance status of the Union by reason of such finding, the injunction does not run against the respondent herein, who was not a party to that action, and does not render the present proceeding *res judicata*. *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U. S. 464, 476; *Swetland* v. *Curry*, 188 F. (2d) 841, 843, C. A. 6th. Nor do we believe that it prevents the respondent from taking the position in this Court that such a finding was made by the Board and urging upon us that we give to it the legal effect which in our opinion results therefrom, although respectfully differing form the legal conclusions reached in another circuit.

This case is complicated by the fact that an appeal on the part of Gold is pending in the Court of Appeals for the District of Columbia from the judgment of the District Court. It is indefinite when that litigation will end, considering the possibility of further proceedings in the Supreme Court in the event of affirmance, and the possibility of a new trial in the event of a reversal. We realize that the ultimate termination of the criminal proceedings in the District of Columbia may present a different factual situation from what is now before us, but consider it inadvisable to "freeze" this proceeding for an unreasonable length of time awaiting such termination, which would in the meantime prevent a possible review by the Supreme Court if so desired by one of the parties. We are accordingly ruling on the motion on the basis of the record as it presently stands.

Respondent's motion to dismiss the petition for enforcement is sustained.

Appendix B

STEWART, Circuit Judge, dissenting.

A court of competent jurisdiction has found that Gold's affidavit of August 30, 1950, was false. The critical date as to compliance with § 9(h) of the National Labor Relations Act as amended was the date of issuance of the Board's complaint. *N. L. R. B.* v. *Dant,* 344 U. S. 375. If the complaint had issued during the twelve month period that this false affidavit was in effect, the question before us would be clear cut. That, however, is not the case.

In August of 1951 Gold filed a new non-Communist affidavit, and it was during the effective period of that affidavit that the complaint in this case issued. No court has found that affidavit to be false. It is true that the Board found in 1954 that the Union was not at that time in compliance with § 9(h). Assuming the Board had power to make such a finding, and assuming further that it be considered a finding that the 1951 affidavit was false, it must, I should think, be supported, like any Board finding, by substantial evidence, considering the record as a whole. We have no such record before us. Indeed, it appears that the question of the truth or falsity of the 1951 affidavit has never been heard on the merits.[1]

In *American Communications Assn.* v. *Douds,* 339 U. S. 382, 414, the opinion in chief, rejecting the claim that § 9(h) was a bill of attainder, emphasized that "members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous ad-

[1] The Board has in effect been enjoined from holding such a hearing.

herence to affiliations and beliefs mentioned in § 9(h), is not a bar to resumption of the position." The conclusion reached in the prevailing opinion seems to me to impose an improper limitation upon Chief Justice Vinson's language.

A jury has found that in 1950 Gold was both a Communist and a liar, to put it bluntly. Yet to indulge in the presumption that he was therefore guilty of committing a criminal offense a year later in filing the 1951 affidavit is further than I can go on the record before us.

For the reasons outlined, I am unable to concur in the views of my colleagues, ably expressed by Judge Miller.